Adopted by the Senate Human Services Committee

March 27, 2023

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1536

Page 1, line 1, replace "a new subsection to section 27-20.3-19" with "sections 27-20.3-19.1, 27-20.3-19.2, 27-20.3-19.3, 27-20.3-19.4, and 27-20.3-19.5"

Page 1, line 2, after the first "to" insert "adopting a state"

Page 1, line 2, after "welfare" insert "act"

Page 1, line 2, after the semicolon insert "to amend and reenact section 27-20.3-19 of the North Dakota Century Code, relating to Indian child welfare;"

Page 1, replace lines 5 through 19 with:

"**SECTION 1. AMENDMENT.** Section 27-20.3-19 of the North Dakota Century Code is amended and reenacted as follows:

27-20.3-19. Indian child welfare - Active efforts and procedures.

1. As used in this section and sections 27-20.3-19.1 through 27-20.3-19.5:

   a. "Act" means this section and sections 27-20.3-19.2 through 27-20.3-19.5.

   b. "Active efforts" means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with the Indian child's family. ~~Active efforts required of the federal Indian Child Welfare Act of 1978 [25 U.S.C. 1901 through 1963] apply or may apply, including during the verification process.~~ If an agency is involved in the child-custody proceeding, active efforts must involve assisting ~~the parent or parents~~a parent or Indian custodian ~~through~~with the steps of a case plan ~~and with~~including accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and tribe. Active efforts are to be tailored to the facts and circumstances of the case. The term includes:

      (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal, with ongoing timely assessment to determine when the threat is resolved and placement of the Indian child can be returned to the custodian.

      (2) Identifying appropriate services and helping ~~the parents~~a parent or Indian custodian to overcome barriers, including actively assisting ~~the parents~~a parent or Indian custodian in obtaining such services.

      (3) Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in providing support and services to

the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues.

(4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's ~~parents~~parent or Indian custodian.

(5) Offering and employing available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the Indian child's tribe.

(6) Taking steps to keep siblings together, if possible.

(7) Supporting regular visits with ~~parents~~a parent or Indian ~~custodians~~custodian in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the Indian child.

(8) Identifying community resources, including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's ~~parents~~parent or Indian custodian or, as appropriate, the Indian child's family, in utilizing and accessing those resources.

(9) Monitoring progress and participation in services.

(10) Considering alternative ways to address the needs of the Indian child's ~~parents~~parent or Indian custodian and where appropriate, the family, if the optimum services do not exist or are not available.

(11) Providing post-reunification services and monitoring.

~~b.~~c. "Adoptive placement" means the permanent placement of an Indian child for adoption.

d. "Extended family member" means a relationship defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, means an individual who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

~~c.~~e. "Foster care or non-foster care placement" means the removal of an Indian child from the home of his or her parent or Indian custodian for temporary placement in a foster home, qualified residential treatment program, residential care center for Indian children and youth, or certified shelter care facility, in the home of a relative other than a parent or Indian custodian, or in the home of a guardian, from which placement the parent or Indian custodian cannot have the Indian child returned upon demand. The term does not include an adoptive placement, a preadoptive placement, or emergency change in placement under section 27-20.3-06 or holding an Indian child in custody.

f. "Indian" means an individual who is a member of an Indian tribe, or who is a native and a member of a regional corporation as defined under 43 U.S.C. 1606.

~~d.~~g. "Indian child" means any unmarried individual who is under the age of eighteen and is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

~~e.~~h. "Indian child custody proceeding" means a proceeding brought by the state involving:

(1) Foster care or non-foster care placement;

(2) A preadoptive placement;

(3) An adoptive placement; or

(4) A termination of parental rights under section 27-20.3-20 for an Indian child.

i. "Indian child's tribe" means the Indian tribe in which an Indian child is a member or eligible for membership or, in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.

~~f.~~j "Indian custodian" means any Indian individual who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control has been transferred by the parent of the Indian child.

~~g.~~k. "Indian tribe" means an Indian tribe, band, nation, or other organized Indian group or community of Indians recognized as eligible for services provided to Indians by the United States secretary of the interior because of their status as Indians, including any Alaska native village as defined in 43 U.S.C. 1602(c).

~~h.~~l. "Parent" means ~~any~~a biological parent ~~or parents~~ of an Indian child or ~~any~~an Indian individual who has lawfully adopted an Indian child, including adoptions under tribal law or custom. The term does not include the unwed father if paternity has not been acknowledged or established.

~~i.~~m. "Preadoptive placement" means the temporary placement of an Indian child in a foster home, home of a relative other than a parent or Indian custodian, or home of a guardian after a termination of parental rights but before or in lieu of an adoptive placement, but does not include an emergency change in placement under section 27-20.3-06.

n. "Termination of parental rights" means any action resulting in the termination of the parent-child relationship. It does not include a placement based upon an act by an Indian child which, if committed by an adult, would be deemed a crime or a placement upon award of custody to one of the Indian child's parents in a divorce proceeding.

2. Before removal of an Indian child from the custody of a parent or Indian custodian for purposes of involuntary foster care placement or the

termination of parental rights over an Indian child, the court shall find that active efforts have been made to provide remedial services and rehabilitative services designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. The court may not order the removal unless evidence of active efforts shows there has been a vigorous and concerted level of casework beyond the level that would constitute reasonable efforts under section 27-20.3-26. Reasonable efforts may not be construed to be active efforts. Active efforts must be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe. Active efforts must utilize the available resources of the Indian child's extended family, tribe, tribal and other relevant social service agencies, and individual Indian caregivers.

3. The court may order the removal of the Indian child for involuntary foster care placement only if the court determines, by clear and convincing evidence, that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child. Evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the Indian child will result in serious emotional or physical damage to the particular Indian child who is the subject of the proceeding. Poverty, isolation, custodian age, crowded or inadequate housing, substance use, or nonconforming social behavior does not by itself constitute clear and convincing evidence of imminent serious emotional or physical damage to the Indian child. As soon as the threat has been removed and the Indian child is no longer at risk, the state should terminate the removal, by returning the Indian child to the parent while offering a solution to mitigate the situation that gave rise to the need for emergency removal and placement.

4. The court may ~~only~~ order the termination of parental rights over the Indian child only if the court determines, by evidence beyond a reasonable doubt that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child.

5. In considering whether to involuntarily place an Indian child in foster care or to terminate the parental rights of the parent of an Indian child, the court shall require that a qualified expert witness must be qualified to testify regarding whether the Indian child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe. An individual may be designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe. If the parties stipulate in writing and the court is satisfied the stipulation is made knowingly, intelligently, and voluntarily, the court may accept a declaration or affidavit from a qualified expert witness in lieu of testimony. The court or any party may request the assistance of the Indian child's tribe or the bureau of Indian affairs office serving the Indian child's tribe in locating individuals qualified to serve as expert witnesses. The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the Indian child. The

qualified expert witness should be someone familiar with the particular Indian child and have contact with the ~~parents~~parent or Indian custodian to observe interaction between the ~~parents~~parent or Indian custodian, the Indian child, and extended family members. The child welfare agency and courts should facilitate access to the family and records to facilitate accurate testimony.

6. An emergency removal or placement of an Indian child under state law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the Indian child.

7. To facilitate the intent of the act, the agency, in cooperation with the Indian child's tribe of affiliation, unless a parent objects, shall take steps to enroll the Indian child in the tribe with the goal of finalizing enrollment before termination.

SECTION 2. Section 27-20.3-19.1 of the North Dakota Century Code is created and enacted as follows:

27-20.3-19.1. Indian child welfare - Jurisdiction over custody proceedings.

1. The act includes requirements that apply if an Indian child is the subject of:

   a. A child-custody proceeding, including:

      (1) An involuntary proceeding; and

      (2) A voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the Indian child upon demand.

   b. An emergency proceeding other than:

      (1) A tribal court proceeding; or

      (2) A proceeding regarding a delinquent act.

   c. An award of custody of the Indian child to one of the parents, including an award in a divorce proceeding; or

   d. A voluntary placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a state agency, chosen for the Indian child and that does not operate to prohibit the Indian child's parent or Indian custodian from regaining custody of the Indian child upon demand.

2. If a proceeding under subsection 1 concerns an Indian child, the act applies to that proceeding. In determining whether the act applies to a proceeding, the state court may not consider factors such as the participation of a parent or the Indian child in tribal cultural, social, religious, or political activities; the relationship between the Indian child and the Indian child's parent; whether the parent ever had custody of the Indian child; or the Indian child's blood quantum.

3. If the act applies at the commencement of a proceeding, the act does not cease to apply solely because the Indian child reaches age eighteen during the pendency of the proceeding.

4. In an Indian child custody proceeding under this chapter involving an Indian child who is not residing or domiciled within the reservation of the Indian child's tribe, the court assigned to exercise jurisdiction under this chapter, upon the petition of the Indian child's parent, Indian custodian, or tribe, shall transfer the proceeding to the jurisdiction of the tribe unless either of the following applies:

   a. A parent of the Indian child objects to the transfer.

   b. An Indian tribe has exclusive jurisdiction over an Indian child custody proceeding involving an Indian child who resides or is domiciled within the reservation of the tribe, except if that jurisdiction is otherwise vested in the state by federal law. If an Indian child is a ward of a tribal court, the Indian tribe retains exclusive jurisdiction regardless of the residence or domicile of the Indian child.

5. In an Indian child custody proceeding under this chapter involving an Indian child who is not residing or domiciled within the reservation of the Indian child's tribe, the court assigned to exercise jurisdiction under this chapter, upon the petition of the Indian child's parent, Indian custodian, or tribe, shall transfer the proceeding to the jurisdiction of the tribe unless any of the following apply:

   a. A parent of the Indian child objects to the transfer.

   b. The Indian child's tribe does not have a tribal court, or the tribal court of the Indian child's tribe declines jurisdiction.

   c. The court determines good cause exists to deny the transfer. In determining whether good cause exists to deny the transfer, the court may not consider any perceived inadequacy of the tribal social services department or the tribal court of the Indian child's tribe. The court may determine good cause exists to deny the transfer only if the person opposing the transfer shows by clear and convincing evidence that the evidence or testimony necessary to decide the case cannot be presented in tribal court without undue hardship to the parties or the witnesses and that the tribal court is unable to mitigate the hardship by making arrangements to receive the evidence or testimony by use of telephone or live audiovisual means, by hearing the evidence or testimony at a location that is convenient to the parties and witnesses, or by use of other means permissible under the tribal court's rules of evidence.

6. An Indian child's tribe may intervene at any point in an Indian child custody proceeding.

7. The state shall give full faith and credit to the public acts, records, and judicial proceedings of an Indian tribe which are applicable to an Indian child custody proceeding to the same extent that the state gives full faith and credit to the public acts, records, and judicial proceedings of any other governmental entity.

SECTION 3. Section 27-20.3-19.2 of the North Dakota Century Code is created and enacted as follows:

27-20.3-19.2. Indian child welfare - Court proceedings.

1. In a proceeding involving the foster care or non-foster care placement of or termination of parental rights to an Indian child whom the court knows or has reason to know may be an Indian child, the party seeking the foster care or non-foster care placement or termination of parental rights, for the first hearing of the proceeding, shall notify the Indian child's parent, Indian custodian, and tribe, by registered mail, return receipt requested, of the pending proceeding and of the parties' right to intervene in the proceeding and shall file the return receipt with the court. Notice of subsequent hearings in a proceeding must be in writing and may be given by mail, personal delivery, facsimile transmission, or electronic mail. If the identity or location of the Indian child's parent, Indian custodian, or tribe cannot be determined, that notice shall be given to the United States secretary of the interior in like manner. The first hearing in the proceeding may not be held until at least ten days after receipt of the notice by the parent, Indian custodian, and tribe or at least fifteen days after receipt of the notice by the United States secretary of the interior. On request of the parent, Indian custodian, or tribe, the court shall grant a continuance of up to twenty additional days to enable the requester to prepare for that hearing.

2. Each party to a child custody proceeding of an Indian child has the right to examine all reports or other documents filed with the court upon which a decision with respect to the out-of-home care placement, termination of parental rights, or return of custody may be based.

SECTION 4. Section 27-20.3-19.3 of the North Dakota Century Code is created and enacted as follows:

27-20.3-19.3. Indian child welfare - Voluntary proceedings - Consent - Withdrawal.

1. A voluntary consent by a parent or Indian custodian to a foster care or non-foster care placement of an Indian child is not valid unless the consent or delegation is executed in writing, recorded before a judge, and accompanied by a written certification by the judge that the terms and consequences of the consent or delegation were fully explained in detail to and were fully understood by the parent or Indian custodian. The judge also shall certify the parent or Indian custodian fully understood the explanation in English or that the explanation was interpreted into a language the parent or Indian custodian understood. Any consent or delegation of powers given under this subsection before or within ten days after the birth of the Indian child is not valid. A parent or Indian custodian who has executed a consent or delegation of powers under this subsection may withdraw the consent or delegation for any reason at any time, and the Indian child must be returned to the parent or Indian custodian. A parent or Indian custodian who has executed a consent or delegation of powers under this subsection also may move to invalidate the out-of-home care placement.

2. A voluntary consent by a parent to a termination of parental rights under subdivision d of section 27-20.3-20 is not valid unless the consent is executed in writing, recorded before a judge, and accompanied by a written certification by the judge that the terms and consequences of the consent were fully explained in detail to and were fully understood by the parent. The judge also shall certify the parent fully understood the explanation in English or that the explanation was interpreted into a language that the parent understood. Consent given under this subsection before or within ten days after the birth of the Indian child is not valid. A parent who has executed a consent under this subsection may withdraw the consent for any reason at any time before the entry of a final order terminating parental rights, and the Indian child must be returned to the Indian child's parent.

SECTION 5. Section 27-20.3-19.4 of the North Dakota Century Code is created and enacted as follows:

27-20.3-19.4. Indian child welfare - Placements preferences.

1. Subject to subsections 3 and 4, in placing an Indian child for adoption or in delegating powers, as described in a lawful executed power of attorney regarding an Indian child, preference must be given, in the absence of good cause, as described in subsection 6, to the contrary, to a placement with or delegation to one of the following, in the order of preference listed:

   a. An extended family member of the Indian child;

   b. Another member of the Indian child's tribe;

   c. Another Indian family with whom the Indian child has a relationship or an Indian family from a tribe that is culturally similar to or linguistically connected to the Indian child's tribe; or

   d. The tribe's statutory adopted placement preferences.

2. An Indian child who is accepted for a foster care or non-foster care placement or a preadoptive placement must be placed in the least restrictive setting that most approximates a family that meets the Indian child's special needs, if any, and which is within reasonable proximity to the Indian child's home, taking into account those special needs. Subject to subsections 4 and 6, in placing an Indian child in a foster care or non-foster care placement or a preadoptive placement, preference must be given, in the absence of good cause, as described in subsection 6, to the contrary, to a placement in one of the following, in the order of preference listed:

   a. The home of an extended family member of the Indian child;

   b. A foster home licensed, approved, or specified by the Indian child's tribe;

   c. An Indian foster home licensed or approved by the department; or

   d. A qualified residential treatment facility or residential care center for children and youth approved by an Indian tribe or operated by an

Indian organization that has a program suitable to meet the needs of the Indian child.

3. An Indian child who is the subject of an emergency removal or placement under a child custody determination under section 27-20.3-06 must be placed in compliance with foster care or non-foster care placement or preadoptive placement preferences, unless the person responsible for determining the placement finds good cause, as described in subsection 6, for departing from the order of placement preference under subsection 2 or finds that emergency conditions necessitate departing from that order. When the reason for departing from that order is resolved, the Indian child must be placed in compliance with the order of placement preference under subsection 2.

4. In placing an Indian child under subsections 1 and 2 regarding an Indian child under subsection 1, if the Indian child's tribe has established, by resolution, an order of preference that is different from the order specified in subsection 1 or 2, the order of preference established by that tribe must be followed, in the absence of good cause, as described in subsection 6, to the contrary, so long as the placement under subsection 1 is appropriate for the Indian child's special needs, if any, and the placement under subsection 2 is the least restrictive setting appropriate for the Indian child's needs as specified in subsection 2.

5. The standards to be applied in meeting the placement preference requirements of this subsection must be the prevailing social and cultural standards of the Indian community in which the Indian child's parent, Indian custodian, or extended family members reside or with which the Indian child's parent, Indian custodian, or extended family members maintain social and cultural ties.

6. a. If a party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child-custody proceeding and the court.

   b. The party seeking departure from the placement preferences bears the burden of proving by clear and convincing evidence that there is good cause to depart from the placement preferences.

   c. A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and must be based on one or more of the following considerations:

      (1) The request of the Indian child's parent, if they attest that they have reviewed the placement options, if any, that comply with the order of preference.

      (2) The request of the Indian child, if the Indian child is of sufficient age and capacity to understand the decision being made.

      (3) The presence of a sibling attachment that can be maintained only through a particular placement.

      (4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be

unavailable in the community where families who meet the placement preferences live.

(5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent, Indian custodian, or extended family resides or with which the Indian child's parent, Indian custodian, or extended family members maintain social and cultural ties.

d. A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.

e. A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a nonpreferred placement that was made in violation of the act.

f. The burden of establishing good cause to depart from the order of placement preference is on the party requesting that departure.

7. The department or a child welfare agency shall maintain a record of each adoptive placement, foster care or non-foster care placement, preadoptive placement, and delegation of powers, made of an Indian child, evidencing the efforts made to comply with the placement preference requirements specified in this section, and shall make that record available at any time on the request of the United States secretary of the interior or the Indian child's tribe.

SECTION 6. Section 27-20.3-19.5 of the North Dakota Century Code is created and enacted as follows:

27-20.3-19.5. Adoptee information.

1. The state court entering a final adoption decree or order in any voluntary or involuntary Indian child adoptive placement must furnish a copy of the decree or order within thirty days to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW, Mail Stop 3645 MIB, Washington, DC 20240, along with the following information, in an envelope marked "Confidential":

a. The birth name and birth date of the Indian child, and tribal affiliation and name of the Indian child after adoption;

b. The names and addresses of the biological parents;

c. The names and addresses of the adoptive parents;

d. The name and contact information for any agency having files or information relating to the adoption;

e. Any affidavit signed by the biological parent or parents requesting the parent's identity remain confidential; and

f. Any information relating to tribal membership or eligibility for tribal membership of the adopted Indian child.

2. The court shall give the birth parent of the Indian child the opportunity to file an affidavit indicating that the birth parent wishes the United States secretary of the interior to maintain the confidentiality of the birth parent's identity. If the birth parent files that affidavit, the court shall include the affidavit with the information provided to the United States secretary of the interior under subsection 1, and that secretary shall maintain the confidentiality of the birth parent's identity."

Page 1, line 20, after "**STUDY**" insert "**- INDIAN CHILD WELFARE**"

Page 1, line 21, remove "implications of codifying the Indian Child"

Page 1, line 22, replace "Welfare Act of 1978 [25 U.S.C. 1901 et seq.]" with "implementation of sections 27-20.3-19 through 27-20.3-19.5"

Page 1, line 22, remove "the Indian"

Page 1, line 23, replace "Child Welfare Act of 1978 [25 U.S.C. 1901 et seq.], section 27-20.3-19," with "federal statutes related to Indian child welfare,"

Page 1, line 23, replace "related" with "relevant"

Renumber accordingly